

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D645/2013

CATCHWORDS

Domestic building – claim for variations – evidence – *Domestic Building Contracts Act 1995* – s.38(2)
effect of - claim for delay damages – meaning – payment of instalments of price – whether made late –
when instalments fell due – counterclaim for defective work – evidence – loss of amenity damages –
when allowed

APPLICANT	Advance Building and Engineering Pty Ltd (ACN: 105 452 855)
RESPONDENTS	Sasko Jovevski, Jessica Jovevski
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	12-13 and 18 March 2015
DATE OF ORDER	27 May 2015
CITATION	Advance Building and Engineering Pty Ltd v Jovevski (Building and Property) [2015] VCAT 740

ORDERS

1. Order the Applicant to pay to the Respondents \$69,825.44.
2. Since the degree to which the claim has been successful is reflected in the amount of the order made in paragraph 1, the claim is otherwise struck out.
3. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr A. Hanifa, director
For the Respondent	Mr J. Heeley of counsel

REASONS

Background

- 1 The Applicant (“the Builder”) is a builder. Its director, Mr Abu Hanifa, is a registered Builder and also a qualified engineer. The Respondents (“the Owners”) are the owners of a dwelling house in Mitcham (“the House”) which was built for them by the Builder pursuant to a domestic building contract dated 4 April 2011 (“the Contract”).
- 2 The Owners were introduced to the Builder by an organisation called M Property Group which arranges house and land packages. They signed the Contract without having met Mr Hanifa and were later informed that Mr Hanifa would be their Builder.
- 3 The Contract price for the construction of the House was \$208,000 and the construction period was 180 days. They paid a deposit of \$10,400 to an organisation entitled “Platinum Real Estate Pty Ltd”, which appears to have been the sales agency that organised the transaction.
- 4 Thereafter there was a considerable delay while finance was approved. Precisely when this occurred is unclear from the evidence but, according to the evidence of Mr Hanifa, he commenced construction on 8 September 2011. Possession of the completed House was not given to the Owners until 5 December 2012.

The respective claims

- 5 The Builder claimed that it was not paid the final payment due under the Contract of \$10,400. It also claimed variations of \$12,232, interest of \$7,348 and “delay damages” of \$3,500. Mr Hanifa admitted that the Builder owes the Owners \$2,050 with respect to a fence for the House that they paid for and when this sum is deducted the net claim by the Builder is \$31,430.
- 6 The Owners admitted that they did not make the final payment of \$10,400 but they denied the Builder’s other claims. They sought damages for defective workmanship, liquidated damages for the delay of the Builder in finishing the House and also general damage for lack of amenity.

The hearing

- 7 The matter came before me for hearing on 12 March 2015 with two days allocated. The Builder was represented by its director, Mr Hanifa and the Owners were represented by Mr J. Heeley of Counsel.
- 8 On the first day I heard the evidence of the Builder’s expert, Mr Forrest and also lay evidence from Mr Hanifa. On the second day I heard the evidence of the Owners’ expert, Mr Beck, followed by further evidence of Mr Hanifa.
- 9 The proceeding was then adjourned part-heard to 18 March 2015 when I heard the cross examination of Mr Hanifa, the evidence of the first Owner,

Mr Jovevski and submissions from Mr Heeley and Mr Hanifa. I informed the parties I would provide a written decision.

The Builder's claims

- 10 Dealing first with the Builder's claims, the claim for the final payment of \$10,400 is not disputed and that will be allowed.
- 11 As to the variations, Mr Heeley pointed out that no documentation for any of the variations was prepared or signed as required by the Contract and also by s37 and 38 of the *Domestic Building Contracts Act 1995*. However in most instances I am not satisfied on the evidence that the variation is allowable. The variations claimed were as follows:

Painting

- 12 Mr Hanifa said that the Contract did not include painting and so the Builder was entitled to charge the painting of the House as a variation.
- 13 The Contract was poorly documented. There were no proper specifications. Rather, there was a two page document entitled "Investor Inclusion List" which set out a number of things that were to be included in the construction.
- 14 Mr Hanifa pointed out that this document did not mention that the House would be painted. There is no mention of painting in the Investor Inclusion List or on the plans. Nevertheless, the Contract required the Builder to build the House and that obligation carries with it an obligation to do all things necessary to complete it in accordance with the Contract documents. A House could not be said to be complete until it was painted. Schedule 5 of the Contract made provision for the Builder to exclude items of work but there is nothing in that schedule to the effect that painting was excluded.
- 15 Further, Mr Hanifa made no claim for painting during the construction period although, on 3 December 2012, just before possession of the House was handed to the Owners, he included in his list of variations a claim of for painting.
- 16 Mr Jovevski said that it was never suggested to him by Mr Hanifa that painting was not included and in the absence of an express exclusion in the Contract I think that it was.
- 17 The list of variations in the invoice of 3 December also included a claim for \$3,500.00 for extra painting. According to Mr Hanifa, that arose as a result of the Owner's complaints as to the quality of the paintwork that was done by the original painter.
- 18 There was no documentation of this alleged variation nor was there a claim made for it at the time. Mr Levin denied that the Owners ever agreed to a variation for extra painting and I am not satisfied that they did. Further, as will appear below, I am satisfied that the paintwork was below standard, even after the alleged further work was undertaken following the Owners' complaints. I am not satisfied with the claim for the extra painting.

Front door

19. Mr Hanifa said that the Owners changed their mind about the handle they wanted on the front door after the original handle had been fitted. He said that the door had to be replaced because it had already been cut to accommodate the original handle.
20. Mr Jovevski said that he ordered the handle for the front door from the Builder's supplier and paid for it well before the first front door was fitted. He said that the Builder had the correct handle in its possession but fitted the wrong handle by mistake. I prefer his evidence over that of Mr Hanifa. I am satisfied that this was a mistake made by Mr Hanifa or his carpenter and that it is not a result of any change of mind by the Owners.

Cooling

21. The property has ducted central heating. Mr Jovevski asked Mr Hanifa about the possibility of adding a cooling unit to the heating system so as to use the same ductwork. Mr Hanifa said that he gave him a price and that by the time he was aware that the Owners did not want to add cooling onto the heating system an expense of \$350 had been incurred.
22. Mr Jovevski said that the Owners did not receive any clear price for adding the cooling and so were never able to make a decision about whether or not to request it. He said that he never told Mr Hanifa that they would proceed with the cooling. I am not satisfied that there was any concluded agreement to add cooling onto the heating system and as such this amount is not recoverable.

Extra concrete on driveway

23. The plans show a concrete porch and a driveway but the Builder has poured a small additional section of concrete from the front of the porch to the driveway for which it has charged \$500.
24. When I asked for an invoice from the concreter for this extra cost Mr Hanifa produced a quotation from the concreting contractor for \$5,780 including GST which appears to be for all of the concreting. The breakdown of the figure includes \$330 including GST for "extra to porch".
25. In its account of 3 December the Builder claimed that the extra cost was \$500, not \$300. Onto that Mr Hanifa has added his margin of 20% and GST. When I asked him why he claimed in his invoice that the extra concrete had cost him \$500 instead of \$300, which was the real cost, he said that he had paid for the concreter's lunch. Why he would pay \$200 for the concreter's lunch was never satisfactorily explained.
26. Mr Jovevski said that he never requested any additional concreting.
27. I do not believe that the Builder has paid \$500 for extra concrete or, if it did, that it was at the Owners' request. I am not satisfied as to this item.

Extra water line and extra gas line in lounge area

28. Mr Jovevski acknowledged that he requested that an extra gas line and an extra water line be put into the wall in the lounge area so that he could install a barbecue on the external wall of the lounge room.
29. For this extra work the Builder has charged \$175 for the water line and \$225 for the gas line. When the hearing resumed on 18 March, which was after the experts had given their evidence and departed, Mr Hanifa sought to tender a statement from the plumber that he had obtained on 16 March 2015. The statement included an allegation that the plumber had charged \$175 inclusive of GST for the extra water line and \$225 inclusive of GST for the extra gas line.
30. Since the expert evidence had already been given and the statement contained other matters that would have required evidence from the experts, I did not allow it into evidence although I did indicate that the Builder should not have claimed GST on top of those figures as it did on 3 December.
31. Apart from that document, Mr Hanifa's own evidence was that the extra work, which the Owners agreed they requested, was done and that it cost the Builder \$400, inclusive of GST.
32. Having been requested by the Owners it was an "owner variation" and so s.38 of the *Domestic Building Contracts Act 1995* applies. That section (where relevant) provides as follows:

"Variation of plans or specifications—by building owner

(1) A building owner who wishes to vary the plans or specifications set out in a major domestic building contract must give the builder a notice outlining the variation the building owner wishes to make.

(2) If the builder reasonably believes the variation will not require a variation to any permit and will not cause any delay and will not add more than 2% to the original contract price stated in the contract, the builder may carry out the variation.

(3) In any other case, the builder must give the building owner either—

(a) a notice that—

(i) states what effect the variation will have on the work as a whole being carried out under the contract and whether a variation to any permit will be required; and

(ii) if the variation will result in any delays, states the builder's reasonable estimate as to how long those delays will be; and

(iii) states the cost of the variation and the effect it will have on the contract price; or

(b) a notice that states that the builder refuses, or is unable, to carry out the variation and that states the reason for the refusal or inability.

(4) The builder must comply with subsection (3) within a reasonable time of receiving a notice under subsection (1).

(5) A builder must not give effect to any variation asked for by a building owner unless—

(a) the building owner gives the builder a signed request for the variation attached to a copy of the notice required by subsection (3)(a); or

(b) subsection (2) applies.

(6) A builder is not entitled to recover any money in respect of a variation asked for by a building owner unless—

(a) the builder has complied with this section; or

(b) the Tribunal is satisfied—

(i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship by the operation of paragraph (a); and

(ii) that it would not be unfair to the building owner for the builder to recover the money.

(7) If subsection (6) applies, the builder is entitled to recover the cost of carrying out the variation plus a reasonable profit.

(8) This section does not apply to contractual terms dealing with prime cost items or provisional sums.”

33. Since the addition of the water and gas lines would not have required a variation to the building permit and is unlikely to have caused any delay to the work and certainly did not add more than 2% to the original contract price stated in the Contract, the Builder was able to carry out the variation, even though the Owners did not give it a signed request.
34. In any case, since the Owners requested the variation and have had the benefit of the work it would not be unfair to order them to pay that sum plus “a reasonable profit” as provided in subsection (7), which I will assess as being the Builder’s margin of 20%.
35. Before adding in the Builder’s margin, the GST must be deducted from the GST inclusive figure of \$400, which brings it to \$363.64. Adding on the margin brings it to \$436.36 and with GST it then becomes \$480.00.

The splash back

36. A splash back was included in the kitchen. Mr Hanifa claimed that it was only included for the width of the cook top and that the Owners requested the Builder to extend it for the full length of the cabinetry. He produced an invoice (Exhibit “M”) for \$650 inclusive of GST for “Extra splashback”
37. Mr Jovevski denied having requested any extension to the splashback. He said that he was not consulted by either Mr Hanifa or the supplier of the splashback as to how wide it should be. I accept Mr Jovevski’s evidence. In

any case, it does not seem to me to be unusual that the splashback should extend for the length of the cabinetry. I am not satisfied as to this item.

Canopy installation

38. The inclusion list included a stainless steel range hood. The Owners ordered a more expensive range hood from the Builder's supplier and paid the difference to the supplier. They also paid the Builder the 20% margin on the difference.
39. Mr Hanifa said that he was charged an extra \$750 to fit the different range hood. The invoice from the tradesman that he has produced (Exhibit "L") states: "Installed range hood due to splashback already installed", suggesting that that was the reason for the extra charge. If so, that is a co-ordination mistake on the part of the Builder.
40. Mr Jovevski said that he was not warned that it would cost any extra to fit the range hood that he had chosen and I am not satisfied with Mr Hanifa's explanation about this additional charge.

Interest

41. The Builder claimed interest for late payment of progress payments. However during the course of the evidence it became apparent that these were all paid promptly and within the seven day period prescribed by the Contract.
42. It is also apparent from a comparison of the Builder's invoices with the dates set out at the foot of the occupancy permit that claims were generally made before the relevant stage was approved. Mr Hanifa did not deny that but said that he did this by arrangement with the Owners so that he would be paid promptly. It appears that he was paid both the frame stage and the lockup stage well before the frame stage was approved. He also claimed the lockup stage in two instalments which is not contemplated by the Contract or by the Act. I am not satisfied that any of the payments claimed by the Builder were paid late.

"Delay damages"

43. The last claim made by the Builder was for "delay damages" of \$3,500. These were claimed pursuant to the provisions in the Contract concerning prolongation claims for an extended building period.
44. Mr Hanifa sought to claim them with respect to the delays that he said occurred in payment of progress payments. The claim is based on a misunderstanding of the operation of these provisions and I find it hard to believe that someone of Mr Hanifa's intelligence and education would have sincerely believed that such a claim was maintainable. In any event, I am satisfied that all payments were made on time.

Conclusion as to the Builder's claims

45. For the foregoing reasons, the only claims on behalf of the Builder that are made out are the final claim for \$10,400 and \$480 for the gas and water for the barbecue. However the Owners seek to set-off against these amounts the damages and other sums due to them on the counterclaim.
46. I now turn to the Owners' counterclaim.

The Owners' claims

47. The Owners claim a refund of \$3,630.00 they have paid for the construction of a fence that was part of the Builder's scope of works. The Builder acknowledges they are entitled to a credit but says that it should be \$2,050.00. The invoices tendered show that the amount is \$3,630.00.
48. For the defects claim, the Owners' expert, Mr Beck, assessed the cost of each item on a "stand alone" basis, that is, that the item in question was the only item of work for the trades that would perform it.
49. In the course of my questioning he acknowledged that, if I were to allow all items, the cost per item in many respects would reduce substantially. I have had regard to that evidence in fixing the amount with respect to the various items. I have also had regard to the assessments of Mr Forrest, which were invariably considerably less than those of Mr Beck.
50. The items complained of are as follows. In each case the amount assessed is a base figure for labour and materials before adding the rectifying builder's margin and GST. Mr Beck has allowed 30% for margin and 10% for GST.

The Front door

51. This is binding on the frame and so is difficult to open. Further, the paintwork is in poor condition and it has not been painted at all on the top and the bottom.
52. Mr Beck allowed an amount of \$871 to remove and refit the door, paint it and supply \$91 worth of materials. Mr Forrest said that the cost would be \$100 for removing the door, shaving off the area that was binding and repainting it.
53. As will be apparent, I am allowing other items which will mean that there will be a carpenter and a painter on site and so it will not take the four hours to remove and rehang the door that Mr Beck has allowed, nor will it take eight hours to repaint it. On this item I will allow as a base figure \$500. On to that will be added, in due course, overheads, profit and GST.

The front driveway

51. The front driveway is exposed aggregate, except for a small area under the portico adjacent to the front door, which is plain concrete. According to Mr Beck this should also have been exposed aggregate.
52. Mr Beck pointed out that there was no expansion joint installed between the concrete paving and the external masonry wall of the House. He also said

there was evidence of stones delaminating from the surface and that he believed that it had not been sealed. He recommended that the concrete driveway be removed and re-laid.

53. Mr Forrest said that he thought that the driveway was a quality finish and noted no loose stones on the day of his inspection.
54. Having viewed the photographs I am not satisfied that it has been demonstrated that the driveway requires replacement. As to Mr Beck's suggestion that the small area in the front portico should be replaced with exposed aggregate, the plans lack any detail about this concrete. It seems to me that the concrete surface the Builder has provided on the front porch is more practical than exposed aggregate would have been.
55. Although I am not satisfied that either the driveway or the front porch area needs to be replaced I do accept that the driveway needs to be primed and sealed. Mr Beck has assessed a cost of \$1,679.85 for that, which will be allowed.

Steel beams and lintels

56. Mr Beck has pointed out that the lintels have not been installed in accordance with the structural drawings in that they do not bear on the brickwork at each end for a distance of at least 230 mm.
57. Mr Hanifa, who is a civil engineer as well as a Builder, said that the bearing of the lintels is sufficient for structural purposes. Mr Forrest said that under the *Building Code of Australia* ("the BCA") the bearing area for clear spans of more than one metre was a minimum of 150mm.
58. The drawings required the bearing area to be 230mm and also for the lintels to be hot dipped galvanised. Mr Beck says that they are not hot dipped galvanised.
59. In one photograph there is evidence of corrosion on the edge of a lintel at the end where it is supported by brickwork. The lintel otherwise appears to have been treated in some way because it has the appearance of a galvanised lintel except in the small area where whatever the coating on it is has come off, possibly as a result of the brick washing process.
60. Mr Beck has allowed the cost of demolishing the brickwork above all lintels, removing the lintels and replacing them with new lintels which are hot dipped galvanised and with the bearing area required by the drawings. The total gross cost of this is \$4,870.
61. As to the extent of the bearing upon the brickwork, the lintels appear to be sufficient in terms of the BCA although they are not in accordance with the greater requirements of the contract documents. It seems to me that, although there is a breach of contract in this regard, no loss flows from it since the lintels are structurally sufficient.
62. As to the fact that they have not been hot-dipped galvanised, it appears from the photographs that they have been treated in some similar way

because, although the treatment has failed or been removed on the edge of one lintel at the end, the rest of the lintels appear to be protected.

63. In those circumstances, it seems to me highly unlikely that Mr Beck's scope of works would ever be undertaken by the Owners. It would be quite unreasonable to allow the cost of a scope of works that will not be done.
64. Instead, it is a matter of compensation for breach of contract. There is a requirement for painting the small areas where the surface treatment of the lintel has broken down and there might be a requirement for further painting at some time in the future. I will allow \$500.

The meter box

65. Mr Beck says that the meter box installed by the Builder is second-hand. He concludes this from its appearance which shows both surface scratches and corrosion. The lock on the meter box door is inoperable and it is kept closed with a piece of twisted wire.
66. There are photographs of the meter box showing rust stains running down the inside of the back of the door. Mr Hanifa denied that it was a second-hand meter box but it certainly has that appearance. It is undamaged but it does not appear to be new, although it is possible that it is, and has suffered some exposure during construction.
67. Mr Beck has costed the removal of the meter box and its replacement with a new one at a gross cost of \$1,680. Almost two thirds of that figure is the cost of disconnecting the meter box from, and reconnecting it to, the mains supply before and after the replacement.
68. The metre box is a functional article situated out of view on the side of the House where the other services are also installed. Its appearance is not of any great importance. Although it is not unsightly, the Owners were entitled to be supplied with a new one that would remain in reasonable condition until the end of construction.
69. Again, it seems to me highly unlikely that if I were to allow the cost of replacement the money would be spent in that way. Rather, I think it is a matter for compensation for the true loss the Owners have suffered. Mr Forrest suggested an amount of \$50 but I think that is inadequate. There will be a painter attending the site and the surface scratches can be made good and the meter box repainted and then a new lock can be fitted. I will allow an amount of \$250 for repairs and returning it to an acceptable condition.

Front windows.

70. The front windows have aluminium frames and there is paint smeared on the frames. It simply needs to be cleaned off. Mr Beck has allowed a gross amount of \$130 being two hours for a labourer. Mr Forrest has allowed \$20. Since there will be a painter on site doing other things I will allow \$80.

No weepholes in brick work under the front windows.

71. This had been raised by an earlier expert but it is not now suggested that this is defective work.

Paling fence.

72. The south side paling fence has a plinth board out of alignment but since this was done by a contractor engaged directly by the Owners with money provided by the Builder this is not defective work by the Builder.

Wall junctions in the garage.

73. This item was raised in an earlier report but it is not now suggested that it is a defect.

Garage pedestrian door.

74. This door is catching and has not been sealed on all six sides with paint. Mr Beck has costed a gross figure of \$430 to remove the door, alter it to properly fit the jamb, refit it and fill and sand the door. Mr Forrest has assessed an amount of \$100 for a similar scope of works. Since there will be painters and carpenters on site doing other work I will allow \$300 for this item.

Ducted vacuum installation.

75. The penetrations servicing the ducted vacuum unit look rough and have not been properly sealed. Mr Beck has assessed a gross amount of \$600 to seal them and fill and sand the wall. His allowance is for four hours for a plasterer and four hours for a painter. Mr Forrest agreed that the installation required some "minor paintwork" for which he allowed \$50.
76. The installation is inside a garage. I think \$600 gross cost is excessive having regard to the fact that there will be painters and plasterers on site doing other things. I will allow \$300.

Brick control joints.

77. These have been poorly executed without any backing rods and, in some instances, without any sealant. Mr Beck has allowed \$780 to rake out each control joint of sealant and mortar, install a backing rod and then re-fill with UV resistant sealant in a matching colour. Mr Forrest has allowed \$150 for caulking.
78. In view of the absence of backing rods the joints will all have to be reworked and so I think Mr Beck's scope of works is more likely to be right. I will allow his figure.

Render finish west side.

79. The render has not extended all the way down to ground level and Mr Beck says that it is "poorly finished". Mr Forrest says that the render is to cover the brick wall only and not the slab. He says there is no defect and that the

ground surface simply needs to be built up. I accept Mr Forrest's opinion and find no defect.

Brickwork.

80. There are a number of complaints concerning the brickwork on the south elevation of the building. There is excessive mortar spill immediately adjacent to the wall. Mr Beck says that there is damaged, chipped and pitted brickwork due to excessive acid cleaning which needs to be removed.
81. There is a photograph (*Photograph 20*) in Mr Beck's report showing a chip on a corner of a brick in the middle but it is unclear whether this is a manufacturing defect in the brick or something that has occurred after the brick was laid. It is not particularly unsightly and Mr Forrest does not consider it to be a defect. Mr Forrest has allowed \$100 to clean up the excessive mortar droppings and I will allow that.

Brickwork construction.

82. The brickwork along the north wall of the House is out of level. Photographs have been tendered showing a misalignment where the north wall meets the face of the garage wall. A spirit level placed on the mortar courses shows them to be out of level. Mr Beck said that the wall needs to be demolished and reconstructed.
83. The Builder tendered what appears to be a statement from the two bricklayers involved, to the effect that the Owners had accepted what they had done and that they would have changed it if they had been asked to do so. That does not answer the criticisms made. The bricklayers were not called.
84. There was considerable discussion about this wall during the hearing. Mr Forrest said that although the brickwork was out of plumb the defect measured over a two metre length was not a visual distraction.
85. I think it is an obvious defect and I accept Mr Beck's evidence that the wall needs to be replaced. Mr Forrest did not cost this item. Mr Beck assessed a gross cost of \$6,575.50 to demolish and rebuild the wall and that will be allowed.

Brickwork mortar.

86. Mr Beck pointed out that the mortar had been patched in a number of places and the colour match was poor between the original and the patched areas. He has allowed a gross cost of \$2,365 for two men for two days to rake out and re-point the brickwork where required. Mr Forrest said that the difference in colour was fading.
87. It seems to me that if bricklayers are going to be on site relaying the north wall that it would not add greatly to the cost of that and Mr Beck acknowledged that to be the case. I will allow an additional \$250 for making good any colour matching of the patching to the mortar.

Brick wall in alfresco.

88. This brickwork is also significantly out of level despite some attempts by the Builder to correct it. Mr Beck has allowed a gross figure of \$2,960 to remove the brickwork on the north side of the west wall of the alfresco area and re-lay the bricks. For that he has allowed two men for one day to remove the brickwork and three men for one day to re-lay it. Mr Forrest suggested that the brickwork be rendered as an alternative to the removal for which he has said would cost \$500.
89. Looking at the photographs in Mr Beck's report, the render solution was used to cover out-of-level brickwork on the masonry pier supporting the alfresco roof.
90. Nevertheless, the alfresco wall is part of the external wall of the House and it would stand out if it were rendered. I am not satisfied that rendering it is a satisfactory alternative. I therefore prefer Mr Beck's opinion.
91. Mr Beck suggested that I could deduct a third from his gross cost if the north wall was to be rebuilt to take account of the fact that there would be bricklayers on site. That being so I will allow \$1,975 as a gross figure for the work in replacing this brickwork.

Alfresco render finish.

92. The alfresco pier has been rendered over as stated above but the Builder has also rendered over the lintels above the windows. Mr Beck queried why this had been done but I accept Mr Forrest's evidence that the finish is acceptable and that it is not defective.

Alfresco piers overhang.

93. The piers are said to overhang by approximately 28 mm and there is a photograph taken by Mr Beck to illustrate the point. When one looks carefully at the photograph it appears that the end of the tape is on the bull nose of the concrete paving. The thickness of the render is uncertain and that makes it unclear how much of the brickwork extends beyond the concrete slab.
94. Mr Beck said that, according to the *Guide to Standards and Tolerances*, brickwork is defective if it projects over a slab or footing by more than 15mm. From viewing the photograph I am uncertain whether or not this limit has been exceeded. If it has been, I think it is by a very small amount. I accept Mr Forrest's evidence that this is not a defect.

Alfresco soffit.

95. The cement sheet lining the alfresco soffit has been joined with the usual joining strips which, according to Mr Beck, are out of alignment by 3mm. Mr Forrest said that they could be adjusted on site and that this was not a defect. This matter was not pursued.

Water tap.

96. The “Investor Inclusion List”, which is the closest that the parties had to a specification, required a fresh water tap to be provided. Only a recycled water tap has been installed.
97. Mr Beck has assessed the gross cost of \$755 for the supply and installation of a fresh water tap at the rear of the House. Mr Forrest assessed the same item at \$250. The major item in Mr Beck’s costing is a full day for a plumber. Since there will be plumbers on site I think this is excessive. I will allow a gross figure of \$400.

Alfresco slab.

98. There is a complaint of some stains on the alfresco slab. There are some marks detectable in the photographs in Mr Beck’s report but they are not particularly noticeable.
99. Mr Beck has costed a gross figure of \$450 for a contractor to remove the stains. Mr Forrest said that they were not noted visually on the day of his inspection.
100. There will be trades on site cleaning up after the major work for which I have allowed a substantial amount and I do not think that I should add an additional amount for what seems to me to be a trifling item.

Laundry door.

101. The timber quad beside the laundry door at the rear of the House has not been painted. Mr Beck has allowed three hours for a painter to paint it at a cost of \$195. Considering there will be painters on site doing other things I think this is excessive. It should take no more than a few minutes to paint this small piece of timber. I will allow an amount of \$50 which is the figure quoted by Mr Forrest.

Mortar holes.

102. Holes have been drilled in the north wall but since I have allowed the cost of demolishing and rebuilding that wall there is no need to make any allowance in respect of this item.

Rubbish.

103. There is a small pile of Builder’s rubble shown in the Photograph 37 in Mr Beck’s report. He has assessed a gross figure of \$440 to move this rubbish, being eight hours for a labourer at \$55 per hour.
104. Since there will be a great deal of rubble removed from the site as a result of the work that I have allowed for I will allow an additional \$50 to remove the rubbish shown in this photograph.

Paintwork/plasterwork.

105. Mr Beck says that the paintwork throughout the House is of a very poor quality. Mr Forrest disagrees and says that it was a fair quality and that no

specific level of paint and plaster works was specified in the Contract. That is so, but the work still must be done in a proper and workmanlike manner.

106. The photographs tendered support Mr Beck's opinion. He has assessed a gross cost of \$4,420 for a plasterer to rectify joins in wall junctions in the plaster and for a painter to paint a further coat on all walls and ceilings. That figure will be allowed.

Range hood height.

107. It was suggested by Mr Beck that the distance between the range hood and the cook top was inadequate. Mr Forrest disagreed. After studying the photograph supplied I accept Mr Forrest's evidence that the distance is sufficient.

Cracking to kitchen ceiling.

108. There is a crack in the plasterboard ceiling at the entry to the kitchen. Mr Beck has assessed a gross cost of \$1,120 to rake out and re-trowel the crack and repaint the ceiling to the nearest break in the line. Mr Forrest has assessed a figure of \$150 for the same scope of works. Since I am allowing for the repair of defective plasterwork and the repainting of the House, that will take account of this defect.

Main bathroom doorway.

109. The floor of the House has been tiled as has the bathrooms. However the floor level of the main bathroom is 25mm higher than the rest of the House. Photographs 48 and 49 in Mr Beck's report show this quite dramatically. It is said to be a tripping hazard and Mr Jovevski said that he and his guests had hit their toes on it.
110. Mr Beck pointed out that the drawings do not provide for a higher floor level in the main bathroom and therefore this is a defect. He said that to rectify the problem would require the removal of the bathroom floor, the lowering of the floor slab and the retiling of the bathroom floor after first having it caulked and sealed. For this he has assessed a gross cost of \$13,950.35.
111. Mr Forrest pointed out that the *Building Code of Australia* does not nominate any minimum edge thickness of bathroom floor transitions and that this is not a defect unless the Contract were to provide that all floor finishes are to be flush and it does not.
112. From the photographs and the evidence it seems to me that this is a dangerous tripping hazard. In some instances a difference between two floor levels can be accommodated in a doorway by putting in a small ramp or fillet of graded timber but in this instance the difference in height is too great.
113. I prefer Mr Beck's opinion that this is defective construction and I see no alternative to the scope of works he has suggested. I will allow the amount of \$13,950.35 that he has assessed.

Bath sprout and mixer.

114. The Owners bought a bath sprout with a backing plate but it has been installed without the backing plate. The hot and cold water have also been reversed on the mixer which, Mr Beck says, is a safety concern.
115. Mr Beck has assessed a cost of \$1,070 to remove and replace the tap and to reverse the plumbing on the mixer. In the course of his evidence however he agreed that, since this tap is against the north wall and since the north wall brickwork is all coming down, access can be obtained from outside which would greatly reduce the cost. That being so I will allow the \$150 figure assessed by Mr Forrest.

Manhole.

116. The manhole is dirty with finger prints but since I am allowing to repaint the ceiling this is already covered.

Kitchen splashback.

117. There is a fine scratch on the kitchen splashback. Mr Beck has suggested that this may have been caused by somebody with a screwdriver. He said that the electrician who fitted a nearby power point might be to blame. This is speculation. I cannot make any finding as to who is responsible for the scratch.

Hot water service.

118. The hot water service is installed on a single concrete paver next to the House. Mr Beck says that, after making inquiries from the manufacturer, he has ascertained that the tank needs to be fully supported on a slab or paver extending at least 100mm past the diameter on all sides.
119. The Builder tendered a statement purporting to be from the supplier of the hot water service, a company called Living Solar Pty Ltd, to say that the slab was the correct size. The author of the statement, a Mr McQueeney, said that a 600mm slab was the largest available, that it was not always possible to use a slab that gives a 100mm clearance on all sides and that they had had similar installations approved in the past. He added that it was common practice to have a small overhang over the slab and that that did not affect the operation or longevity of the slab.
120. Mr Beck assessed the cost of \$475 for five hours of a plumber's time to drain and disconnect the hot water service and then reconnect it. Mr Forrest has assessed the cost of replacing the paver at \$50.
121. Mr McQueeney was not called and, given Mr Beck's expert opinion as to the required slab, I think I must find that the slab provided was insufficient and must be replaced.
122. I think Mr Beck's figure is excessive given that there will be a plumber on site in regard to other matters. Mr Forrest's figure of \$50 seems to be inadequate having regard to the fact that a larger paver slab will have to be

purchased and someone will have to put it in place. I will allow \$150 on this item.

Ceiling insulation

123. Ceiling insulation is missing in large areas of the ceiling and the batts appear to be of the wrong size and type. The Investor Inclusion List required the Builder to provide glass wool batts and the batts provided are polyester. Mr Beck has costed a figure of \$1,430 to remove the incorrect insulation and install glass wool batts in accordance with the documents.
124. Mr Forrest says that the ceiling insulation was accepted by the building surveyor and raised the possibility that the batts might have been disturbed after installation.
125. I think the photographs indicate that there was very little insulation provided and such as was provided was not that specified by the Contract. I prefer Mr Beck's opinion and will allow the amount that he has calculated.

Exhaust fans.

126. Mr Beck said that the exhaust fans were required to be vented to the outside atmosphere. Mr Forrest said that this is only required where the roof tiles have sisalation beneath them. The photographs show that there is no sisalation installed in this roof and so it does not appear that external venting is required.

Water pipes in ceiling.

127. Mr Beck said that the water pipes in the ceiling have not been appropriately secured. Mr Forrest did not consider this to be a defect, noting that the plumber had issued a compliance certificate.
128. From the photographs in Mr Beck's report, the pipes seem to be laid over the bottom chords of the trusses without any fixing or clipping. In some instances they are laid adjacent to electrical wires and down lights which Mr Beck says is dangerous because the heat from the fire cap of a down light could melt the water pipe.
129. I accept Mr Beck's opinion that the pipes need to be better secured. He has assessed a gross amount of \$760 for a full day for a plumber to adjust and alter all plumbing water pipes. It seems to me that since a plumber will be on site doing other things clipping these pipes into position is unlikely to take the plumber a full day. I will allow half the amount calculated which is \$380.

Electrical cables in ceiling.

130. Mr Beck makes a similar complaint about the electrical cables in the ceiling which he says are not properly secured. According to the photographs in his report they are lying over the bottom chords of the trusses.
131. He pointed out that the appropriate standard required that wires be properly secured where they are in an area where they could reasonably be disturbed.

132. Mr Forrest noted that the electrician had issued a safety compliance certificate and that he did not consider this to be a defect.
133. I prefer Mr Beck's opinion and will allow the cost of clipping any loose cables in the appropriate areas although not through the whole House. He has allowed a full day for an electrician but since there will be an electrician on site for other matters I will allow half the day at a gross cost of \$380.

Building rubbish in ceiling.

134. Mr Beck says there is some building rubbish in the ceiling space. This includes redundant duct work from the heating system.
135. Since I am allowing the cost of removing non-compliant insulation batts I do not see that this is going to add to the cost and so it is inappropriate to allow an additional figure for this.

External gas pipe.

136. There is an exposed polyethylene pipe projecting from the House to the hot water service and back again. Mr Beck said that it needs to be painted to avoid deterioration. Mr Forrest said that the plumber had issued a compliance certificate and that this was not a building defect but I prefer Mr Beck's opinion.
137. Mr Beck allowed a gross figure of \$316, but this is on the assumption that the painter has no other work. It is a tiny area and added to the other paintwork that I have allowed for, this is only a few minutes extra work. I will allow \$25.

Fascia gutters pond.

138. Mr Beck says that the fascia gutter on the north side of the House had evidence of water ponding to a depth of approximately 12mm. He pointed out that the *Guide to Standards and Tolerances* says that gutters are defective if they retain a depth of water in excess of 10mm.
139. I have allowed for the replacement of the north wall and so this problem should be attended to at the same time. It is inappropriate to make an additional allowance.

Internal door hardware.

140. There are two different profiles for striker plates within the House and some of the hinges have been installed upside down. There are also some screws missing from the hinges. Mr Forrest did not consider the use of two different types of striker plate to be a building defect and there is no evidence that they are malfunctioning.
141. Mr Beck has allowed a gross figure of \$2,045 to remove all the door hardware and install new matching hardware in a proper and workmanlike manner.
142. It seems to me that the hardware that has been supplied is operable. Mr Beck's figure allows for a full day for a carpenter and two days for a

painter. Since I am allowing the repainting of the whole House it is inappropriate to make any allowance for a painter. I think that for the carpenter I should allow only four hours to reverse the hinges so that they are not upside down and replace the missing screws shown in the photographs. That will be an amount of \$260.00.

Flexible sealant.

143. Mr Beck said that the flexible sealant between the timber skirtings and the door jambs in the floor tiling was poor and he has allowed a gross amount of \$820 to remove and replace it. I could not see anything in the photographs to support what Mr Beck says. Mr Forrest said that there was no defect. I am not satisfied as to this item.

Kitchen sink.

144. The left hand edge of the sink sits excessively proud of the bench and needs to be reinstalled. Mr Forrest did not consider that to be a defect but I accept Mr Beck's opinion that it needs to be refitted. He has allowed six hours for a plumber to do this but that is on the basis that he will have no other work.

145. Since there will be a plumber on site already and there is little work to be done on this item I will allow a gross figure of \$100 to take account of one hour's labour and some material.

Builder's margin

146. Mr Beck allowed a builder's margin on the raw cost of labour and materials of 30%. That figure comprises 20% overheads and 10% profit. Mr Forrest's margin was incorporated in his assessments. It is rectification work and I accept Mr Beck's evidence that a figure of 30% for overheads and profit is reasonable.

Preliminaries

147. Mr Beck allowed \$7,450 for preliminaries, before margin and GST. That was for a scope of works assessed at a little below \$65,000 in total before adding margin and GST. Mr Forrest did not make any allowance for Preliminaries, saying that it was not "a construction site".

148. Although I have disallowed some items and reduced others, the scope of work is substantial and a builder will need to be engaged to undertake it and assume responsibility for the site while work is in progress. I therefore accept Mr Beck's evidence that there will be site set-up costs that will be reflected in the price the Owners will have to pay.

149. Mr Beck has set out the costs in detail in his report and it would seem that these will still be incurred, notwithstanding the reduced scope of works. His figure will therefore be allowed.

Total cost of rectification

150. The total base rectification cost is \$35,035.70, as follows:

Front door	\$ 500.00
Seal front driveway	\$ 1,679.85
Allowance to paint lintels	\$ 500.00
Repairs and compensation for metre box	\$ 250.00
Clean paint from windows	\$ 80.00
Garage pedestrian door	\$ 300.00
Ducted vacuum installation	\$ 300.00
Brick control joints	\$ 780.00
Clean brickwork	\$ 100.00
Rebuild north wall	\$ 6,575.50
Make goog mortar colour	\$ 250.00
Brickwork in al fresco	\$ 1,975.00
Install water tap	\$ 400.00
Trim on laundry door	\$ 50.00
Remove rubbish	\$ 50.00
Deficient paintwork	\$ 4,420.00
Bathroom floor	\$13,950.35
Bath tap	\$ 150.00
Hot water service	\$ 150.00
Ceiling insulation	\$ 1,430.00
Water pipes in ceiling	\$ 380.00
Electrical cables in ceiling	\$ 380.00
Paint gas pipe	\$ 25.00
Internal door hardware	\$ 260.00
Refit sink	<u>\$ 100.00</u>
	\$35,035.70
Plus Preliminaries	<u>\$ 7,450.00</u>
Total cost	<u>\$42,485.70</u>

151. There must then be added the rectifying builder's margin and GST. The total the becomes \$61,112.04, as follows:

Total cost	\$42,485.70
------------	-------------

Builder's margin 30%	<u>\$12,745.70</u>
Total cost including margin	\$55,350.40
Plus GST	<u>\$ 5,535.04</u>
Total to be allowed	<u>\$60,885.44</u>

Liquidated damages

152. The Owners also claim liquidated damages of \$250 per week from 1 January 2012 until 5 December 2012, when they took possession.
153. Mr Hanifa acknowledged that the Builder had run over time but said that, because the Owners had not paid him his 20% margin on more expensive items that they had bought and paid for over the Builder's Range", he told them that he would slow down the work". I was concerned when he gave this evidence that he might be asserting that work was suspended. However he is an educated man and I am satisfied that he understood the distinction. He did not suggest that the Builder suspended work. Only that he slowed it down until he was paid his margin.
154. If a builder believes that an owner is in breach of contract he might be entitled under the terms of the contract to suspend the work if he follows the appropriate procedure set out in the contract. However, the Builder had no right in this case to "slow down" the work and if it did so it risked running beyond the construction period and incurring an obligation to pay liquidated damages.
155. Mr Jovevski said that there was a hold up with the work when Mr Hanifa went overseas. He said that nothing was done until he returned.
156. The basis of the Owners' claim is that the Building Permit was issued on 25 August 2011 and the Builder was required by Clause 10 of the Contract to commence construction 21 days later, which is said to be 10 September 2011. The building period specified in Item 1 of Schedule 1 of the Contract was 180 days. If work had commenced on 10 September, the building period would have expired on 13 March 2012.
157. The claim as made ignores Clause 10.1, which states that the Building Period starts on the actual day of commencement. The Owners are also required to provide certain essential information (Clause 13) before the period starts. I have insufficient evidence as to when the essential information was provided but the date of actual commencement of work was 7 November 2011. The Building Period therefore expired on 6 May 2012.
158. Liquidated damages were fixed by Item 9 of Schedule 1 at \$250 per week and so the Owners are entitled to liquidated damages pursuant to Clause 40 of the Contract from 6 May until the date for possession, 5 December, a period of 213 days. That amounts to \$7,607.15.

Rental and other costs whilst repairs are affected

159. The Owners also claimed the cost of renting alternate accommodation at the rate of \$380 per week for a period of two months during which it is expected that rectification work will occur. Mr Beck said that, if all of the scope of works he allowed for was undertaken, then two months was a reasonable time. I find that most of what he allowed for has to be done and it is not apparent that the period should be reduced on account of what I have not allowed.
160. As to the cost of alternate accommodation, prices have been obtained from two suppliers for two bedroom houses and apartments ranging in price from \$209 per day to \$333 per day. They claim \$11,940.00, for two months which is slightly less than \$200 per day.
161. Since the north wall and another wall need to be reconstructed, the interior of the House needs to be repainted and the bathroom needs to be retiled, I accept that it is reasonable that the Owners to move out while the work is being done. Mr Beck said that it would be better if the Owners were not there and I accept that evidence.
162. The Owners also claimed removalist's expenses. They have produced a quotation from a removalist stating that it will cost \$119.00 per hour for two removalists and that the time expected to be taken will be five to seven hours. Five hours would therefore be \$595.00. There will also be the cost of moving back into the House after repairs are effected which will also cost \$595.00. They seek \$1,666.00 which assumes that it will take seven hours but it might only take five.
163. The major internal work is the re-tiling of the bathroom, which contains no furniture. The only work to the furnished areas is the re-painting and there is no necessity to move out the furniture for that to be done. I do not think that it is reasonable to allow for furniture removal and storage.

Loss of amenity

164. The Owners also claimed damages for loss of amenity. Mr Jovevski said that he was "stressing out" over the defects and this proceeding. Mr Heeley submitted that I should award damages for loss of amenity to the Owners and suggested a figure of \$5,000.00.
165. He referred me to the Tribunal's decisions in *Anderson & Anor v Wilkie* [2012] VCAT 432, *Kounelis v Ross Horton Homes Pty Ltd* [2014] VCAT 319 and *Harmonious Blend Building Corporation Pty Ltd v Ibrahim* [2014] VCAT 1084.
166. In the last of these cases I summarized the position in regard to such a claim as follows (at para 205 et seq.):
- "...physical inconvenience, anxiety and distress as a result of a builders' breach of contract are compensable but only physical inconveniences and mental distress directly related to those inconveniences which have been caused by the

breach of contract. The Court also cautions that damages awarded under this head will rarely be large but this is because of the very nature of the loss being compensated, not any vague principle of restraint.

206. The Tribunal's power to award damages in an order resolving a domestic building dispute is conferred by s.53(2)(b)(ii) of the Act. However, by s.54(2), the term "domestic building dispute" does not include a dispute or claim for personal injury. In a number of cases this Tribunal has determined that, as a consequence of s.54(2), a claim for personal injury cannot be pursued in proceedings in the Tribunal under the Act, even if it arises out of a domestic building dispute (see: *Henley Arch Pty Ltd v Hannagan* [1999] VCAT 29 at para 10; *Anderson & Anor v Wilkie* [2012] VCAT 432 at para 29).

207. Damages of the nature now sought have been awarded by this Tribunal in building cases although the amounts awarded have tended to be much less than the figures that Mr Silver suggested.

208. In *Anderson & Anor v Wilkie* [2012] VCAT 432 I found that the damage suffered by the Applicants living in a wet house for 2 ½ years and facing the inconvenience of having to move out while repairs were effected were compensable in the Tribunal whereas claims for headaches said to have been caused by having to work long hours to pay for the house and lack of sleep and stress resulting from both the defects themselves and the dispute with the builder were not. For the former matters I awarded \$5,000. In *Kounelis v Ross Horton Homes Pty Ltd* [2014] VCAT 319 I awarded \$2,000 damages for the damages arising from having to live in the house whilst substantial repairs were affected."

167. Every Owner of a house with defects will suffer some inconvenience and every person involved in litigation will find the process stressful. However stress amounting to personal injury cannot be compensated in this Tribunal and it must be the breach itself that causes the loss of amenity. It is not the practice to award loss of amenity damages to every successful owner as a matter of course. It must be appropriate to do so having regard to the facts of the case.

168. There is no real loss of amenity arising from these defects. The cost of rectification is being allowed and, while the repairs are carried out, the Owners will be living elsewhere and the cost of that is being allowed against the Builder. By the time the Owners return to the House the repairs will have been affected.

169. I am not satisfied that damages should be awarded in this case for loss of amenity.

Orders to be made

170. Subject to the Owner's set-off, the Builder's claim is allowed in the sum of \$10,880.00, being the balance of the contract price of \$10,400 plus the gas and water for the barbecue of \$480.

171. The Owners' claims are allowed at \$80,932.04, as follows:

(a) Damages for rectification of defects	\$60,885.44
(b) Liquidated damages	\$ 4,250.00
(c) The fence	\$ 3,630.00
(d) Alternate accommodation	<u>\$11,940.00</u>
	<u>\$80,705.44</u>

172. The amounts will be set off and there will be an order that the Builder pay to the Owners \$69,825.44.

173. Costs will be reserved.

SENIOR MEMBER R. WALKER